NO. 48980-5

COURT OF APPEALS, DICISION II
OF THE STATE OF WASHINGTON

JOHN WORTHINGTON,

Appellant,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD AND WASHINGTON STATE,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

The Washington State Liquor and Cannabis Board responded to a public records request made by Appellant John Worthington by providing him with exactly the records he requested: "the entire rule making file for I-502 rule making" that existed at the time of his request. On review, the superior court correctly determined that the Board provided Worthington with the records he requested and that the interpretation of the Administrative Procedure Act provision governing the maintenance of rulemaking files was not at issue in this Public Records Act case. Though Worthington believes that the agency should have maintained its rulemaking files differently, he did not demonstrate any genuine issue of material fact or that he was entitled to judgment as a matter of law. The Board provided everything he requested, and the superior court properly granted summary judgment to the Board.

II. COUNTERSTATEMENT OF THE ISSUES

A. Worthington made a public records request for "the entire rule making file for I-502 rule making." Did the Board fully comply with the Public Records Act by providing him with a copy of all I-502 related rulemaking files that existed at the time of his request?

B. In a lawsuit brought under the Public Records Act, can an individual obtain relief for an agency's alleged violation of the Administrative Procedure Act?

C. Did the Board conduct an adequate search for "the entire rule making file for I-502 rule making" by seeking the records from its

rulemaking coordinator, who was responsible for maintaining the agency's official rulemaking files?

D. A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment. When considering the summary judgment motions, did the trial court properly decline to consider the inadmissible evidence that Worthington provided?

E. A trial court's oral opinion has no final or binding effect unless formally incorporated into a judgment. Did the trial court correctly decline to consider an oral ruling delivered by a different superior court judge in an unrelated matter?

F. Did the trial court abuse its discretion when it denied Worthington's motion for reconsideration that relied on new, inadmissible evidence and raised new arguments that could have been raised in his summary judgment motion or response?

III. STATEMENT OF THE CASE

This Public Records Act case arose after Appellant John Worthington made a public records request of the Board in February 2015 for "the entire rule making file for I-502 rule making." CP 591, 609–10. The Board had completed an initial rulemaking process to implement Initiative 502 in 2013, creating chapter 314-55 WAC. In the years after, it made several amendments to the chapter.

A. Background on Initiative 502 and Initial Rulemaking

Washington voters approved Initiative Measure 502 in November 2012. Laws of 2013, ch. 3; Clerk's Papers (CP) 589. The Initiative directed the Board to establish a system for issuing licenses to producers, processors, and retailers of marijuana, for recreational use. Laws of 2013,

ch. 3; CP 589–90. The Initiative was codified as part of chapter 69.50 RCW. *See generally* RCW 69.50.325–369; CP 590.

In December 2012, the Board began its first rulemaking process to begin implementing I-502. Wash. St. Reg. 12-24-090 (filed Dec. 5, 2012); CP 590. The Board filed with the code reviser a preproposal statement of inquiry for a new chapter in title 314 of the Washington Administrative Code to implement the Initiative. Wash. St. Reg. 12-24-090. This rulemaking process will be referred to as the "initial I-502 rulemaking."

After a 10-month rulemaking process, the Board completed its initial I-502 rulemaking in October 2013. Wash. St. Reg. 13-21-104 (filed Oct. 21, 2013; effective Nov. 21, 2013); CP 590. The resulting rules were adopted as chapter 314-55 WAC. Wash. St. Reg. 13-21-104; WAC 314-55-005; CP 590.

In the midst of the Board's initial I-502 rulemaking process, in July 2013, the Board responded to a public records request from an individual named Arthur West. CP 590. The Board's response to West included the rulemaking file for the initial I-502 rulemaking as it existed at that time, but the Board's initial I-502 rulemaking was not yet completed. CP 590; Wash. St. Reg. 13-21-104 (Board's final rules adoption, Oct. 21, 2013).

In 2014, while the Board was involved in a judicial review action brought by West in superior court, the Board prepared for filing as a

certified administrative record the final rulemaking file of the initial I-502 rulemaking. CP 590. This file consisted of 6,924 pages. *Id.*

Since the initial I-502 rulemaking, the Board has adopted several revisions to chapter 314-55 WAC. *See* Wash. St. Reg. 14-02-022, 14-16-066, 15-02-065, 16-01-111 (semi-annual rulemaking agendas, filed: Dec. 20, 2013; July 30, 2014; Jan. 6, 2015; Dec. 17, 2015). All of the Board's rulemaking processes after the initial I-502 rulemaking process described above will be referenced herein as "supplementary I-502 rulemaking."

B. Worthington's Request to Inspect the Rulemaking File

On February 19, 2015, the Board's rulemaking coordinator, Karen McCall, received an email from Worthington asking "to make a time with the WSLCB to review the I-502 rule making file." CP 645, 649. Around the same time, the Board's Public Records Compliance Manager, Bob Schroeter, received a similar request from another individual, Elizabeth Hallock. CP 591, 600. Schroeter contacted both Worthington and Hallock by joint email to arrange a time for them to review the requested file at the Board's headquarters. CP 591, 600, 645, 648–49.

Worthington appeared in person at the Board's headquarters on February 23, 2015, to review the I-502 rulemaking file. CP 591. At the conclusion of the visit, Schroeter provided Worthington with the agency's public record request form. *Id.*

C. Worthington's Public Records Requests #15-02-161 and #15-02-170

The next evening, Worthington emailed Schroeter a public records request for selected pages of the file he had examined. CP 591, 604. In the email, Worthington referenced specific pages in the records he had reviewed, writing:

> Bob,
> Apparently there is a working rule making file. Is that the rule making file we looked at. [sic]
>
> Also, I would like electronic copies of the following documents:
>
> 1. 5547-5548
> 2. 6026-6084
> 3. 4552-attached Ezra Eickmeyer
> 4. 2361-attached Kretz letter
> 5. 5001-5193
> 6. 4720-4999
> 7. 6532-6724

CP 604. Schroeter assigned the request an internal tracking number of Public Record Request (PRR) #15-02-161. CP 591, 603–04.

On February 26, 2015, the Board received another public records request via email from Worthington. CP 591, 609–10. Worthington wrote:

> Hello,
>
> I am requesting the entire rule making file for I-502 rule making in an electronic format.

CP 591, 609–10. This request was assigned internal tracking number PRR #15-02-170. CP 591, 609–10.

On March 3, 2015, Schroeter responded to Worthington's first request, PRR #15-02-161, by email. CP 591–92, 603–04. Schroeter responded to Worthington's statements about a "working" rulemaking file, explaining:

> On February 19, 2015, you requested to review on February 23, 2015, the entire I-502 rulemaking file which is the rulemaking file for the Board's original adoption of chapter 314-55 WAC in 2013. Although I have not personally maintained the rulemaking file, my staff and I were pleased to accommodate the visit based upon your request made pursuant to RCW 34.05.370. Prior draft versions of the rulemaking file, prior to adoption of the I-502 rules, no longer exist as rulemaking files are continuously updated until completed and finalized upon adoption of rules. This is the final rulemaking file for the Board's original adoption of chapter 314-55 WAC that you inspected.

CP 603.

On March 5, 2015, Schroeter responded to Worthington's second request, PRR #15-02-170, by email. CP 592, 609–10. The email estimated that records were expected to be available by May 7, 2015. CP 592, 609. The email also noted that Worthington's request appeared to be similar to his earlier request, PRR #15-02-161. CP 592, 609. Schroeter asked Worthington to advise if he wanted to withdraw either request as duplicative. CP 592, 609. Worthington responded,

> Just go with the latter encompassing request not the request below.
> PRR # of 15-02-161.

CP 592, 612. Based on that communication, the Board closed the first request, PRR #15-02-161. CP 592.

Schroeter contacted McCall to provide the relevant records. CP 592. As rulemaking coordinator, McCall was responsible for maintaining the Board's official rulemaking file for each rule the Board adopts or proposes. CP 644–45; *see also* RCW 34.05.370(1)–(2). The Board's official rulemaking files are kept in paper format in a file cabinet in the Board's director's office. CP 645. McCall provided all of the rulemaking files for all of the Board's rulemaking under I-502 to the Board's public records unit. CP 592, 645–46. This included the entirety of the initial I-502 rulemaking file, as had been previously prepared and finalized for filing with the superior court in West's judicial review action, and all rulemaking files for supplementary I-502 rulemaking. CP 592, 645–46. The Board's public records staff then began scanning the rulemaking files in March and continued its work into the month of April. CP 592–93.

On April 8, 2015, Worthington sent an email to a public records staff member again requesting "to look at the I-502 rule making file ASAP." CP 593, 615. In response, the staff member indicated that his latest request was already covered by PRR #15-02-170, which was still pending. CP 593, 615. She also provided Worthington the first installment

of records: the complete rulemaking file for the initial I-502 rulemaking process. CP 593, 615.

On May 7, 2015, the Board completed its response by sending Worthington scanned copies of the files for both initial and supplementary I-502 rulemaking. CP 593–94, 620–22. No responsive records were withheld and no information was redacted. CP 593–94, 620. Schroeter stated in his email, "if there are other records which you believe should be in this link that are responsive to your request, please feel free to contact me so that I can assist you directly." CP 593–95, 620. Worthington did not respond to Schroeter's email or otherwise identify other records he believed the Board should have provided him in response to his request. CP 593–95.

D. Public Records Requests Made by Other People

In his brief, Worthington compares the records he received from the Board to the records other people received to different public records requests.[1] Those requests were different—in scope, timing, or both—and are summarized here.

On March 17, 2015, Elizabeth Hallock submitted a public records request for not only "the complete rulemaking file associated with the LCB's rules regarding Initiative 502," but also "any correspondence and

[1] A summary of the requests, prepared for the superior court, appears at CP 716.

records, including metadata, regarding the 'working' rule-making file." CP 595–96, 628. Hallock later clarified her request to include "any prior exemption logs that were a part of the I502 rulemaking file." CP 595–96, 624–28.

In June 2015, almost four months after Worthington submitted his request for the rulemaking file, John Novak and Leland Fore submitted separate public records requests to the Board "for the complete I-502 rule making file." CP 596–98, 630–33, 637–40. Though these requests from Novak and Fore were similar to Worthington's request in content, the Board provided additional records in response to Novak and Fore because the Board had engaged in additional rulemaking since Worthington made his request in February. CP 596–98; Wash. St. Reg. 15-11-107 (adopting permanent rules, filed May 20, 2015); Wash. St. Reg. 15-08-035 (notice of proposed rules, filed Mar. 25, 2015).

Finally, in October 2015, Novak made a request to the Board for "all files from a previous request, #13-08-040." CP 597–98, 642–43. Novak's previous request, PRR #13-08-040, was submitted in August 2013, and sought not only the "rule making file for I-502," but also "[a]ll documents and correspondence regarding the Rule Making File." CP 597, 635. At the time of Novak's PRR #13-08-040, the Board had not yet completed the initial I-502 rulemaking. CP 590, 597, 635.

E. Superior Court Lawsuits

Worthington sued the Board under the Public Records Act (PRA), chapter 42.56 RCW, based on the Board's response to his "PRA Requests to view the entire I-502 rule making file for all the I-502 rules" in February 2015. CP 5. He alleged, among other things, that the Board had "silently withheld" records that were responsive to his request. CP 4–12. Most of Worthington's allegations related to his assertion that under the Administrative Procedure Act (APA), "[t]here is no such thing as a 'final' or 'working copy' of the rulemaking file," and he wanted the "original rulemaking file." CP 8.

The Board filed a Motion for Judgment on the Pleadings, and Worthington filed a Motion for Summary Judgment. CP 694–96. In resolving the cross-motions, the superior court agreed with the Board that the PRA provides no relief for Worthington's allegations that the Board erred in its application of RCW 34.05.370, the APA provision that addresses the contents of agency rulemaking files. *Id.*; RP 14:22–18:11, Dec. 4, 2015. The court concluded, "In the context of the Public Records Act, the State is entitled to say what the rulemaking file is," and "[w]hether or not that rulemaking file is consistent with the APA, chapter 34.05 RCW, is a different case." CP 695; RP 16:22–25, Dec. 4, 2015. The court denied Worthington's motion for summary judgment, as it was

"principally based on questionably admissible evidence," and his legal arguments "require[d] the Court to adopt Mr. Worthington's perspective on the APA, which the Court will not do in this case." CP 696; RP 17:13–23, Dec. 4, 2015. The superior court also denied the Board's motion, concluding that Worthington's PRA claims could not be resolved solely on the pleadings. CP 695; RP 17:1–12, Dec. 4, 2015.

Shortly after the superior court made its oral ruling on the parties' motions, Worthington filed a second PRA complaint against the Board, based upon the same underlying set of facts. CP 4–9, 669–70, 682–86, 690–92. The second PRA complaint merely added allegations about the Board's records production to other requestors. CP 4–9, 682–86. The court granted the Board's motion to consolidate the two lawsuits. CP 690–92, 697–98.

The parties then filed cross-motions for summary judgment in the consolidated cases. CP 190–199 (Pl.'s Am. Mot. for Summ. J.), 562–87 (Defs.' Mot. for Summ. J.). The Board submitted declarations of Schroeter and McCall, with attached exhibits, to demonstrate that it had fully complied with the PRA in responding to Worthington's PRR #15-02-170. CP 588–649.

Worthington submitted his own declaration and exhibits in support of his motion. CP 200–84. He sought to prove his claims by asserting that

the Board had provided different versions of rulemaking files to other requestors. CP 190–99. He relied primarily on a comparison of the number of bytes of data within various electronic files that he had reviewed. *Id.*

The superior court concluded there were no genuine issues of material fact for trial, denied Worthington's motion, and granted summary judgment to the Board. CP 779–82. The superior court also denied Worthington's motion for reconsideration. CP 783–84. Worthington appeals.

IV. STANDARD OF REVIEW

"Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Summary judgment is reviewed de novo. *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). The court examines whether disputed issues of material fact exist and whether the Board was entitled to judgment as a matter of law. CR 56(c); *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 733, 218 P.3d 196 (2009). In reviewing an order granting a motion for summary judgment, the appellate court considers only the evidence and issues called to the attention of the trial court. RAP 9.12.

V. SUMMARY OF ARGUMENT

The superior court correctly ruled that the Board fully complied with the Public Records Act (PRA), chapter 42.56 RCW. The Board established, through competent evidence, that it provided the records Worthington requested and did not "silently withhold" records. The Board gave Worthington "the entire rule making file for I-502 rule making" as it existed at the time he made his request.

The superior court also correctly ruled that the PRA does not incorporate the Administrative Procedure Act (APA), chapter 34.05 RCW, and offers no relief for an alleged violation of that separate Act. Worthington failed to present admissible evidence in support of his arguments and improperly sought to rely on an oral ruling of a different superior court judge in an unrelated lawsuit against the Board. This Court should affirm the superior court's order of summary judgment in the Board's favor and the denial of Worthington's motion for reconsideration.

VI. ARGUMENT

A. The Board Complied With the Public Records Act by Providing Worthington With All of the Records He Requested

Worthington requested a copy of "the entire rule making file for I-502 rule making," and the Board provided him with a copy of all I-502

rulemaking files that existed at the time of his request. The superior court correctly granted summary judgment to the Board.

The PRA mandates disclosure of public records and requires that all public records be available for inspection and copying. RCW 42.56.070(1); RCW 42.56.080; *Bonamy v. City of Seattle*, 92 Wn. App. 403, 408, 960 P.2d 447 (1998). While the Act has a broad mandate in favor of disclosure, "it does not provide a right to citizens to indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or described to the agency." *Bldg. Indus. Ass'n of Wash.*, 152 Wn. App. at 734 (internal quotations omitted); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869 (1998).

Agencies must promptly make records available for inspection and copying "upon request for identifiable public records." RCW 42.56.080; *Bonamy*, 92 Wn. App. at 409. While there is no specific requirement for the form of a request, "a party seeking documents must, at a minimum, provide notice that the request is made pursuant to the [PRA] and identify the documents with reasonable clarity to allow the agency to locate them." *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) (citing *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000)). An "identifiable public record" is "one for which the requestor has given a

reasonable description enabling the government employee to locate the requested record." *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009).

Importantly, an agency "cannot be expected to disclose records that have not yet been requested. To hold otherwise would place public agencies in an untenable position." *Id.* The PRA "does not require agencies to research or explain public records, but only to make those records accessible to the public." *Id.*

On February 26, 2015, the Board received an email from Worthington "requesting the entire rule making file for I-502 rule making in an electronic format." CP 609–10. Five business days later, the Board provided Worthington with a response and provided a time estimate for its completion of providing records. CP 592, 609–10. The Board's rulemaking coordinator, McCall, provided the Board's public records unit with the entirety of the initial I-502 rulemaking file, as had been previously prepared and finalized for filing in 2014 with the court in the rule challenge brought by West. CP 590, 592, 645–46. McCall also provided all of the files for the Board's supplementary I-502 rulemaking. CP 592, 646.

The Board gave Worthington a first installment of records on April 16, 2015, and provided a final response on May 7, 2015. CP 593–94, 615,

620. In these responses, the Board sent Worthington scanned copies of all of the records that McCall had provided to the public records unit, which comprised the entirety of the initial I-502 rulemaking file and the supplementary I-502 rulemaking files. CP 592–94, 645–46. In providing records to Worthington, the Board neither withheld nor redacted any responsive records. CP 593–94, 620. The evidence shows that the Board made records promptly available for inspection and copying upon Worthington's request for identifiable public records. The Board fully complied with the PRA in responding to Worthington's request. *See* RCW 42.56.080. The Board did not "silently withhold" records. Appellant's Am. Opening Br. at 2.

Worthington alleges that the Board should have given him more records than it did. His argument seems to be based on his idea that the rulemaking file should have contained additional materials that were in fact not part of the file when he made his request. Appellant's Am. Opening Br. at 6, 10, 19–20, 27, 29, 31, 33. But the issue under the PRA is only whether the agency provided the records sought, not whether the Board's files should have contained something they did not in fact contain. *See* argument at Section VI(B), below. If Worthington wanted something else it was incumbent upon him to ask for it. When a request is specific and clear about the records requested, the agency will not be found to have

violated the PRA by producing only the exact records requested. *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 101, 332 P.3d 1136 (2014); *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 715–16, 248 P.3d 150 (2011); *Wright v. Dep't of Soc. & Health Servs.*, 176 Wn. App. 585, 593–94, 309 P.3d 662 (2013). That is what the Board did here.

In *Faulkner v. Department of Corrections*, the agency received a request for a copy of "the CRCC Local Mail Rejection Disposition Notice Mail Rejection F—4—60," a document that did not exist. *Faulkner*, 183 Wn. App. at 101. The court held the agency "did not have a duty to produce a document that was not in existence." *Id.* The court also rejected Faulkner's argument that the Department should have disclosed a different document, entitled "Options for Rejected Mail," because Faulkner's request "did not identify the 'Options' document with reasonable clarity to allow DOC to locate it." *Id.*

Similarly, in *Wright v. Department of Social and Health Services*, this Court concluded the agency's failure to produce copies of a training manual and investigation protocols in response to a request for "any and all documents relating to Amber Wright" did not violate the PRA. *Wright*, 176 Wn. App. at 593–94. The two documents at issue provided general agency guidance and procedures, but were not specific to Wright's individual history with the agency. *Id.* at 593. Wright's request for "any

and all documents" relating to herself "neither expressly mentioned nor identified with 'reasonable clarity' the manual or the protocols." *Id.* at 593–94. Thus, the agency did not violate the PRA. *Id.*

In *Greenhalgh v. Department of Corrections*, this Court rejected a requestor's arguments that an agency should have provided more documents in response to a request. *Greenhalgh*, 183 Wn. App. at 715–16. The Court's careful review of the record showed that the agency complied with the specific requests that Greenhalgh made. *Id.* The Court reiterated that "[t]he PRA does not 'require public agencies to be mind readers.'" *Greenhalgh*, 183 Wn. App.at 714 (quoting *Bonamy*, 92 Wn. App. at 409).

Here, as in *Faulkner*, *Wright*, and *Greenhalgh*, the agency provided the records identified by Worthington: the entirety of the I-502 rulemaking files that existed at the time of his request. Though Worthington asserts that the Board should have provided more documents than his request identified, this Court should conclude, as it has before, that the agency did not violate the PRA by providing the documents that the requestor *actually* identified. *See Faulkner,* 183 Wn. App. at 101; *Wright*, 176 Wn. App. at 593–94; *Greenhalgh*, 183 Wn. App. at 713–16. The Board provided the rulemaking files that Worthington requested. CP 592–94, 645–46. Worthington's request did not identify any other documents with reasonable clarity to allow the Board to locate them. The

agency cannot be expected to provide records that have not been identified with reasonable clarity, enabling the agency employee to locate the requested record. *See Hangartner*, 151 Wn.2d at 447; *Beal*, 150 Wn. App. at 872; *Greenhalgh*, 183 Wn. App. at 714.

Because the Board provided Worthington with the records he requested, the Court should affirm.

B. The Public Records Act Neither Incorporates the Administrative Procedure Act nor Offers Relief for an Alleged Violation of the Administrative Procedure Act

The essence of Mr. Worthington's argument is not that the Board failed to give him the records that he requested, but rather that he thinks the rulemaking files he requested should have included additional materials that they in fact did not include. His allegations are premised on an argument that the Board, *sometime before the time it received and responded to his request,* did not follow the APA in maintaining its rulemaking files. CP 5; Appellant's Am. Opening Br. at 4–5, 30–32. But as the superior court properly concluded, whether or not an agency's rulemaking file is consistent with the APA is not within the scope of a PRA action—instead, it is "a different case" that can only be reviewed within the scope of APA judicial review. CP 695; RP 16:21–25, Dec. 4, 2015.

The APA requires agencies to maintain an official rulemaking file for each rule that it adopts or proposes, and establishes generally what must be included in an rulemaking file.[2] RCW 34.05.370. The APA also "establishes the exclusive means of judicial review of agency action," except in narrowly-limited circumstances that do not apply here. RCW 34.05.510. "Agency action" under the APA includes "the adoption . . . of any agency rule." RCW 34.05.010(3). Thus, an individual who believes an agency has failed to maintain a proper rulemaking file in the adoption of an agency rule may seek relief only under the Administrative Procedure Act—not the PRA.[3] Alternately, a party could probably seek relief from a court under RCW 34.05.570(4), which allows for judicial review of agency action other than a review of an agency rule or order.

This Court has declined to allow requestors to obtain relief under the PRA for alleged violations of other statutes. In *West v. Department of Natural Resources*, 163 Wn. App. 235, 244–45, 258 P.3d 78 (2011), the requestor argued that the agency had an obligation to produce requested documents under the PRA even though it had "destroyed" certain emails and allegedly violated the records retention act, chapter 40.14 RCW, in

[2] The statute allows some measure of agency discretion. For example, an agency must only include certain materials if they are "regarded by the agency as important to adoption of the rule or the proceeding on which the rule is based." RCW 34.05.370(2)(c).

[3] The superior court's decision in a separate APA judicial review action Worthington filed against the Board is also pending before this Court. *Worthington v. Washington State Liquor and Cannabis Board, et al.*, 49050-1-II.

doing so. The court rejected this argument, concluding there is no agency action to review under the PRA where the agency did not deny the requestor the record because the record sought did not exist. *Id.* at 245 (citing *Bldg. Indus. Ass'n of Wash.*, 152 Wn. App. at 740).

Here, as in *West*, the Court should reject the argument that an alleged violation of another statute can amount to a violation of the PRA, and thus the Court should decline to entertain any argument about the required content of the rulemaking file. Nothing in the PRA incorporates APA standards for the contents of agency rulemaking files. *See generally* chapter 42.56 RCW. Therefore, an agency's alleged error under APA requirements for maintaining a rulemaking file does not amount to a potential violation of the PRA. *See generally* chapter 42.56 RCW. The Board provided records that were responsive to Worthington's request—its entire rulemaking files for I-502 rulemaking that existed at the time of his request. That Worthington believes the Board should have kept its rulemaking files differently is of no consequence.

Similar to the circumstances in *West*, there is no additional agency action to review under the PRA because the Board did not deny Worthington access to records—it provided him the records he requested, as explained above. *See* argument at Section IV(A). Worthington never expanded his request beyond "the entire rule making file for I-502 rule

making." CP 591–95. When the Board sent Worthington what it anticipated was the complete response to the request on May 7, 2015, it gave him an express opportunity to respond if he was unsatisfied, but he did not respond. CP 593–95, 620. The Court should affirm the superior court's decision.

C. The Board Complied With the Public Records Act by Conducting an Adequate Search for Responsive Records

The Board did not unlawfully provide different responses to different requestors, when the records requests themselves were different. Worthington's arguments relating to requests other than PRR #15-02-170 rest on the erroneous assumption that the PRA requires an agency to provide identical responses to similar PRA requests in all circumstances. It does not. Instead, the PRA requires an agency to conduct a reasonable search for records that are responsive to a request, and to provide the requestor with those records that the agency finds in its search.[4] *Block v. City of Gold Bar*, 189 Wn. App. 262, 270–72, 355 P.3d 266 (2015), *review denied*, 184 Wn.2d 1037 (2016).

Whether an agency complies with the PRA is a fact-specific inquiry. *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 653 334 P.3d 94 (2014); *Block*, 189 Wn. App. at 271 (quoting *Neighborhood*

[4] The agency may redact or withhold records that are subject to a specific, enumerated exemption. *Block*, 189 Wn. App. at 270.

Alliance of Spokane Cty. v. Spokane Cty., 172 Wn.2d 702, 719, 261 P.3d 119 (2011)). The adequacy of a records search is "judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." *Hobbs v. State*, 183 Wn. App. 925, 943, 335 P.3d 1004 (2014) (quoting *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012), *review denied*, 177 Wn.2d 1002 (2013)) (internal quotation marks omitted). The focal point of the judicial inquiry is the agency's search process, not the outcome of its search. *Id.* (quoting *Forbes*, 171 Wn. App. at 866). The issue is not whether any further documents might conceivably exist, but whether the search was adequate. *Id.* (quoting *Forbes*, 171 Wn. App. at 866).

Agencies are required to make more than a perfunctory search; the search "should not be limited to one or more places if there are additional sources for the information requested." *Block*, 189 Wn. App. at 271 (quoting *Neighborhood Alliance*, 172 Wn.2d at 719). But at the same time, a reasonable search need not be exhaustive. *Kozol v. Dep't of Corr.*, 192 Wn. App. 1, 8, 366 P.3d 933 (2015).

To establish that its search was adequate in a motion for summary judgment, an agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. *Block*, 189 Wn. App. at 271. The

evidence should describe the search and establish that all places likely to contain responsive materials were searched. *Id.*

Here, Worthington made a public records request for a specific file: "the entire rule making file for I-502 rule making[.]" CP 591, 609–10. The Board searched for responsive records by seeking the relevant rulemaking files from McCall, the Board's rulemaking coordinator, who was responsible for maintaining the agency's official rulemaking files. CP 592, 644–46. Under the circumstances of Worthington's request, the Board's search was reasonably calculated to uncover all relevant documents. *See Hobbs*, 183 Wn. App. at 943; *Kozol*, 192 Wn. App. at 8. The Board's public records unit had no reasonable need to look elsewhere for responsive documents, as the rulemaking coordinator was the only source for the information Worthington requested. The agency looked in all the places the records should have been, and thus, its search was adequate. *See Kozol*, 192 Wn. App. at 8.

Furthermore, the timing of a public records request is critical. An agency's duty under the PRA is limited to provide *existing* records. *See Bldg. Indus. Ass'n of Wash.*, 152 Wn. App. at 734; *Smith v. Okanogan Cty.*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000). The Board, as the agency responsible for carrying out licensing provisions under I-502, has engaged in several rulemaking processes for marijuana-related rules since

voters first approved I-502. *See* Wash. St. Reg. 14-02-022, 14-16-066, 15-02-065, 16-01-111 (semi-annual rule-making agendas, filed: Dec. 20, 2013; July 30, 2014; Jan. 6, 2015; Dec. 17, 2015). The fact that individuals who made requests later than Worthington received additional documents is neither surprising nor material for purposes of evaluating whether the search for records responsive to Worthington's request was adequate. The Board's duty was to provide Worthington with those responsive records that existed as of the date of his request. It did so. CP 592–94, 615–22, 645–46. The Board did not violate the PRA.

Even if the Court were to consider the requests made by individuals other than Worthington, it should find that Worthington failed to establish a violation of the PRA. Each of the other requests he cites differed meaningfully from Worthington's. *See* CP 716 (summary of requests at issue). Hallock's request in March 2015 and Novak's requests in August 2013 and October 2015[5] ultimately sought "correspondence" and other records related to the rulemaking file—not just the rulemaking file. CP 595–98, 624–28, 635, 642–43. The two requests in June 2015 from Novak and Fore were made approximately four months after Worthington's request, and after the Board had made substantial revisions

[5] Novak's request in October 2015 was for "all files from a previous request, #13-08-040." CP 597–98, 642–43. The previous request included a request for "[a]ll documents and correspondence regarding the Rule Making File." CP 597, 635.

to chapter 314-55 WAC. CP 596–98; Wash. St. Reg. 15-11-107 (adopting permanent rules, filed May 20, 2015); Wash. St. Reg. 15-08-035 (notice of proposed rules, filed Mar. 25, 2015). It thus makes sense that Worthington did not receive the exact same records the other requesters received.

D. The Superior Court Properly Declined to Consider Inadmissible Evidence When Ruling on the Summary Judgment Motions

The superior court correctly concluded that there was no genuine issue of material fact and that the Board was entitled to judgment as a matter of law. In addition to the reasons described above, the superior court's decision was proper because Worthington relied on inadmissible evidence in support of his motions and in response to the Board's motion.

A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment. CR 56(e); *Cano-Garcia v. King Cty.*, 168 Wn. App. 223, 249, 277 P.3d 34 (2012). Materials offered in support of a summary judgment motion must meet the detailed requirements stated in CR 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

"Underlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible." *Int'l Ultimate, Inc., v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745, 87 P.3d 774 (2004); *see also* ER 901(a); *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). Because the proponent seeking to admit a document must make only a prima facie showing of authenticity, the requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact-finder to find in favor of authenticity. *Int'l Ultimate*, 122 Wn. App. at 745–46. CR 56(e) "requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be." *Id.* at 746; *see also* ER 901(a). To authenticate an email, the party offering the evidence must provide testimony by a person with knowledge of an email's purported sender. ER 901(b)(10).

Additionally, hearsay evidence, which is generally inadmissible, cannot be considered in ruling on a motion for summary judgment. ER 802; *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). Hearsay is a statement, other than one made by the declarant, offered to prove the truth of the matter asserted. ER 801(c).

In support of his first motion for summary judgment, Worthington submitted his own declaration stating he had "personal knowledge of the

facts stated herein," but then, without explanation, attached 48 pages of emails, policy briefs, drafts, memoranda, and notes. CP 13–61; *see also* Supp. CP (Defs.' Resp. to Mot. for Summ. J. at 6–8) (Defendants' objections). He also submitted a supplemental declaration, attaching an additional 29 pages of emails, pleadings from other matters, and rulemaking comments, again without explanation other than to say that Novak "sent me emails." CP 159–89. He failed to identify or authenticate the documents, as he provided no explanation as to what each of the documents was, where it came from, or what factual assertions it supported. CP 13–61, 159–89; *see Int'l Ultimate*, 122 Wn. App. at 745–46; ER 901(a). Additionally, the declarations and attachments contained inadmissible hearsay evidence. *See id.*; ER 801(c); ER 802. CP 694–96; RP 17:14–16, Dec. 4, 2015.

Despite the Board's objections to and the court's ruling on his first motion for summary judgment, Worthington again submitted only questionably admissible evidence in support of his second motion for summary judgment. *See* CP 200–84. First, Worthington's Exhibits A and H contain copies of emails sent or forwarded to Worthington by other unknown individuals—presumably Novak. But nothing in Worthington's declaration identifies each document, its source, or explains how the pages are logically associated with each other. CP 200–01, 203–33 (Ex. A), 282–

84 (Ex. H). Therefore, Worthington did not properly authenticate the emails. *See* ER 901(b)(10). But even assuming that each email in Worthington's exhibits is actually a copy of an email Worthington received from Novak, the contents of Novak's emails appear to consist of messages that Novak himself received from other people. CP 207–21, 282–84. Worthington did not offer testimony by a person with knowledge of those senders, and he thus can neither authenticate nor rely on the contents of those emails for their truth. *See Int'l Ultimate*, 122 Wn. App. at 745–46; ER 901.

Exhibit A also contains copies of two complaints against the Board from other plaintiffs, Hallock and Fore. CP 222–231. These complaints show nothing more than allegations that other parties have made against the Board. These documents should not be accepted as having any value on summary judgment because they are not sworn affidavits meeting the standard of CR 56(e).

Worthington's declaration and exhibits contain inadmissible hearsay evidence regarding public records requests and responses between the Board and Novak, Hallock, and Fore. CP 200–01, 203–33 (Ex. A), 282–84 (Ex. H). As already explained, Worthington relies on emails and attachments, apparently forwarded from Novak, to prove the truth of matters asserted with respect to both Hallock and Fore. This is

inadmissible hearsay, which the Court should not consider. *Dunlap*, 105 Wn.2d at 535.

Worthington's declaration also states that he has taken "screen shot[s] of the thumb drive properties" of various records, and he provided various screenshots as exhibits without sufficient explanation or identification to ascertain how Worthington obtained the evidence and to what it extent it was manipulated. CP 201, 235–61. These exhibits also contain inadmissible hearsay, because Worthington asked the superior court to rely on their truth. *See* ER 801(c).

Worthington's response to the Board's motion for summary judgment also relied on evidence—much of the same evidence described above—that was not properly authenticated and that constituted inadmissible hearsay. CP 297–342. For the same reasons as described above, the superior court properly declined to consider this evidence.

The superior court correctly refused to consider inadmissible evidence in ruling on the cross-motions for summary judgment. CR 56(e); *Cano-Garcia*, 168 Wn. App. at 249. Because the evidence Worthington submitted was inadmissible, the superior court properly concluded that there were no genuine issues of material fact for trial, and properly determined that the Board was entitled to judgment as a matter of law.

E. Worthington Improperly Relies on an Oral Ruling Delivered by a Superior Court Judge in an Unrelated Matter

Throughout his brief, Worthington references a ruling by Thurston County Superior Court Judge Christine Schaller in a separate PRA lawsuit filed by Arthur West. Appellant's Am. Opening Br. at 4–5, 15, 20–21, 24, 31–32. The first time Worthington provided evidence of this other ruling was in his motion to reconsider, filed after his second motion for summary judgment. CP 365, 507–25.

In any event, the oral ruling in the West case was never entered as a written order, and that lawsuit was dismissed upon the parties' stipulation. Supp. CP (Decl. of Bruce Turcott in Support of Defs.' Resp. to Mot. for Summ. J. at 1–2). A trial court's oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *State v. Mallory*, 69 Wn.2d 532, 533–34, 419 P.2d 324 (1966); *see also State v. Collins*, 112 Wn.2d 303, 308–09, 771 P.2d 350 (1989). And a court's oral opinion is no more than an expression of the court's informal opinion at the time rendered. *Mallory*, 69 Wn.2d at 533.

Here, the ruling to which Worthington refers was an oral ruling in a case with different parties and different facts, and was never entered or incorporated into a formal written order. Supp. CP (Decl. of Bruce Turcott in Support of Defs.' Resp. to Mot. for Summ. J. at 1–2). Moreover,

collateral estoppel "should not be applied to judgments of dismissal, even when based on settlement agreements, since the parties could settle for myriad reasons not related to the resolution of the issues they are litigating." *Marquardt v. Fed. Old Line Ins. Co.*, 33 Wn. App. 685, 689, 658 P.2d 20 (1983). The superior court properly denied Worthington's requests for relief on the grounds of the oral ruling in the West case. RP 15:25–16:7, Dec. 4, 2015. This Court should, too.

F. The Superior Court Did Not Abuse Its Discretion in Denying Worthington's Motion for Reconsideration

Worthington's final series of arguments involve the superior court's denial of his motion for reconsideration. Appellant's Am. Opening Br. 33–42.

"By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts." *River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012). But while the issue is preserved, the standard of review is for abuse of discretion. *Id.* "Abuse of discretion" means a decision that is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.* "The trial court's discretion extends to refusing to

consider an argument raised for the first time on reconsideration absent a good excuse." *Id.*

Here, the trial court acted well within its discretion when it denied Worthington's motion for reconsideration. The court explained in its ruling that much of the pleadings and arguments on reconsideration were the same as what it considered initially, that Worthington filed a "great deal of inadmissible evidence" in support of his motion, and that any new evidence submitted with the motion was untimely. Corrected RP 19: 9–20:12, May 6, 2016; CP 783–84.

Worthington's arguments on reconsideration (and to this Court) rely heavily on evidence that he offered for the first time with his motion to reconsider. CP 365–535. The only provision in CR 59 that allows a court to consider new evidence is CR 59(a)(4). Under that rule, a court may reconsider a decision on the basis of "newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). Evidence is not "newly discovered" by a party if it was available to the party but not offered until after the opportunity has passed. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 500, 183 P.3d 283 (2008). For that reason, a declaration that was not presented to the trial

court on a motion for summary judgment does not qualify as "newly discovered" evidence unless the party shows that the declaration could not have been obtained earlier. *Go2Net*, 115 Wn. App. at 91.

Here, none of the evidence Worthington offered in support of his motion for reconsideration was "newly discovered." It had all been available to Worthington for months before the parties filed their cross-motions for summary judgment in February and March of 2016. CP 190, 365–535, 562. Worthington's declaration and attachments in support of his motion for reconsideration show dates ranging from 2013 through October 2015. CP 365–535. He failed to demonstrate that he "could not with reasonable diligence have discovered and produced" the new evidence at the time of his motion for summary judgment, or in response to the Board's cross-motion. *See* CR 59(a)(4). The trial court properly denied reconsideration on this basis. Corrected RP 20:5–7, May 6, 2016.

Worthington's new evidence was also inadmissible. Corrected RP 19:16–20, May 6, 2016. Worthington neither properly identified nor authenticated the documents he attached to his declaration in support of his motion for reconsideration. Instead, his declaration made vague and conclusory allegations, such as "On October 31, 2015 and on other dates, I notified the AG, WSLCB and others that specific documents were illegally removed from the 1-502 rulemaking file. (Exhibit 1)". CP 365.

The attached Exhibit 1 consists of 67 pages that appear to be various emails, memos, drafts, notes, and other documents—the source and relevance of which were not identified. CP 365–434. Similarly, Exhibit 2 to the declaration consists of 96 pages of emails, discovery responses in other cases, pleadings, and transcripts—the source of which were not identified.[6] CP 365, 435–532. Therefore, in addition to its untimeliness, the superior court reasonably declined to consider the new evidence because it was inadmissible. Corrected RP 19:16–20, May 6, 2016.

Much of Worthington's argument on reconsideration amounted to a late attempt to discredit the declarations the Board submitted in support of its summary judgment motion. Appellant's Am. Opening Br. at 33–42. He did not raise these arguments in his response to the Board's motion. CP 285–96. For that reason, the trial court properly refused to consider the argument. *River House Dev.*, 167 Wn. App. at 231 ("The trial court's discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse.").

[6] While many of the documents in Exhibit 2 appear to be copies of discovery responses provided to Worthington by the Board, the exhibit also includes unexplained discrepancies, such as a document on the sixteenth page of the exhibit, immediately before "Plaintiff's 4th Set of Interrogatories and Requests for Production to Chris Marr and Answers and Objections Thereto," that appears to be the second page of some unrelated pleading signed by Worthington on April 20, 2016. CP 451. This type of discrepancy made it impossible for the Court to accept or properly address the authenticity of the entire 96-page exhibit.

Finally, Worthington's arguments rely on his own interpretation of how an agency should maintain rulemaking files under the Administrative Procedure Act. But as already explained, the proper scope of the Court's decision in this case is whether the Board complied with the PRA in responding to Worthington's request, not whether the Board maintained its files in accordance with a litigant's interpretation of a separate law.

The trial court did not abuse its discretion in denying Worthington's motion for reconsideration.

VII. CONCLUSION

The Court should affirm the superior court's judgment in this case because the Board established that it fully complied with the PRA in responding to Worthington's request for records.

RESPECTFULLY SUBMITTED this 10th day of October, 2016.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of October, 2016, at Olympia, WA.

Bibi Shairulla

BIBI SHAIRULLA, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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